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Criminal Law: Guilty of Something: *Gilson v. State* and the Death Penalty for Omission in Oklahoma

Carla Mullins

NOTES

Criminal Law: Guilty of Something: *Gilson v. State* and the Death Penalty for Omission in Oklahoma

I. Introduction

Two men on a mission to repossess an apparently deserted trailer house made a gruesome discovery at 114 Midnight Drive in Little Axe, Oklahoma. As the men labored to move a forlorn freezer out of the way, they discovered the skeletal remains of eight-year-old Shane Alan Coffman. Initially, Shane's mother, Bertha Jean Coffman, and her live-in boyfriend, Donald Lee Gilson, denied any knowledge of the child's cause of death. The two subsequently changed their stories. On February 11, 1996, two days after Shane's body was found, the State charged Coffman and Gilson with first degree murder.[1]

In addition to the murder charges, the State charged both defendants with five counts of injury to a minor child,[2] conspiracy to unlawfully remove a dead body,[3] and unlawful removal of a dead body.[4] Shane's mother first entered *Alford*[5] pleas to the charges, then became a witness for the State, and was ultimately sentenced to life without the possibility of parole.[6] Fortunately for Shane's mother, she jumped on the prosecutor's proverbial bandwagon and escaped a death sentence. But someone needed to pay for Shane's death. Donald Lee Gilson will die because a Cleveland County jury agreed he was surely guilty of something.

This note submits that the State of Oklahoma inappropriately sentenced Gilson to death. The sentence resulted from a trial replete with error and a non-unanimous verdict based, at least partially, on his omission to act. Part II of this note details the facts and errors alleged by Gilson and explores the Oklahoma statute on child abuse murder. Part III explores case precedent prior to *Gilson*, while Part IV examines the holding and reasoning of the *Gilson* decision as issued by the Oklahoma Court of

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1. Gilson v. State, 2000 OK CR 14, 8 P.3d 883. The State tried and convicted Gilson under title 21, section 701.7(c) of the Oklahoma Statutes. *Id.* ¶ 31, 8 P.3d at 901. This note limits its examination to the first degree murder conviction. Although some of the errors are alleged in connection with the other charges, the appropriateness of the court's decision as to those charges falls outside the scope of this note. Gilson alleged other errors not relevant to the death penalty sentence, which also fall outside the scope of this note.

2. 10 OKLA. STAT. § 7115 (1991).

3. 21 OKLA. STAT. § 421(a)(5) (1991).

4. *Id.* § 1161.

5. *Gilson*, 2000 OK CR 14, ¶ 17, 8 P.3d at 898. This type of plea, articulated in *North Carolina v. Alford*, 400 U.S. 25 (1970), allows a defendant to enter a plea of guilty while still maintaining innocence and the judge renders the sentence.

6. Lisa Beckloff, *Coffman Gets Life Sentences: Judge's Sharp Words Send Mother to Prison*, DAILY OKLAHOMAN, May 29, 1998, at A1.

Criminal Appeals. Part V explains why this author believes the *Gilson* court reached an incorrect conclusion and explains the negative impact *Gilson* will have on the future of Oklahoma criminal law. Part VI compares the child abuse murder statute in Oklahoma to laws in other jurisdictions across the country. This note concludes that the accumulation of errors in this case should have resulted in reversal or sentence commutation.[7]

II. Gilson v. State

A. The Facts

Bertha Jean Coffman had six children before Shane's death — thirteen-year-old Jeremy, twelve-year-old Isaac, eleven-year-old Tranny, ten-year-old Tia, eight-year-old Shane, and seven-year-old Crystal.[8] The children had previously been removed from Coffman's custody due to sexual abuse perpetrated by Coffman's former boyfriend and unsanitary living conditions in Coffman's trailer.[9] About that time, Coffman met Gilson.[10] He helped her get her trailer in a livable condition, and DHS returned the children to her.[11] The two became romantically involved, and in July 1995, Coffman and her children moved into Gilson's trailer.[12] At the time of Coffman and Gilson's arrest, they were both living in Gilson's trailer with four of the six Coffman children.[13]

During the time they lived in Gilson's trailer, Coffman allegedly committed various forms of abuse, including beating the children with various objects, withholding food

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7. *See* Brief of Appellant at 100, *Gilson* (No. F-98-606). Gilson alleged the following errors: (1) his conviction was ex post facto; (2) joining the child abuse and child abuse murder charges deprived him of due process of law; (3) the suggestive interviewing techniques used on the children violated several well-established principles of fair play; (4) the preclusion of his former attorney's testimony violated both the Oklahoma and Federal Constitutions; (5) the evidence of death-eligible aggravating circumstances was insufficient to support the jury's findings; (6) the evidence of permitting child abuse and child abuse murder was insufficient to establish guilt beyond a reasonable doubt; (7) the trial court failed to instruct on a lesser-included offense; (8) the child abuse murder statue is unconstitutionally vague; (9) the aggravating circumstances failed to perform the required narrowing function; (10) the errors in jury instructions violated his rights to due process and reliable sentencing procedures; and (11) the appellant was deprived of effective assistance of counsel. *Id.* at 40, 56, 63, 75, 82, 85, 89, 92, 96, 97, 99.

8. *Gilson*, 2000 OK CR 14, ¶¶ 2-5, 8 P.3d at 895-96.

9. *Id.* ¶ 5, 8 P.3d at 896. Oklahoma Governor Frank Keating demanded a full report on the incident from the Department of Human Services (DHS) and subsequently commissioned investigations by three state agencies. Robert Medley, *Boy's Death Prompts Call for DHS Report*, DAILY OKLAHOMAN, Feb. 14, 1996, at A1. At Governor Keating's insistence, the DHS Office of Client Advocacy, the Child Death Review Board, and an office of the Oklahoma Commission on Children and Youth all investigated Shane's death. In the wake of Shane's death, the Oklahoma legislature easily passed stricter DHS guidelines, requiring long-term supervision of parents after children are returned from DHS custody and other child abuse prevention provisions. Mick Hinton, *Officials Applaud Legislature's Efforts to Aid State's Children*, DAILY OKLAHOMAN, June 10, 1996, at A1.

10. *Gilson*, 2000 OK CR 14, ¶ 5, 8 P.3d at 896.

11. *Id.*

12. *Id.* ¶ 6, 8 P.3d at 896.

13. *Id.* In June 1995, Jeremy, the oldest Coffman child, ran away from home. *Id.* ¶ 6, 8 P.3d at 896.

from the children, and making the children remain in the bathtub for hours at a time.[14] On August 17, 1995, Shane died as a result of extensive abuse.[15] Each witness at trial had a different account of what happened to Shane that night. The main controversy became whether Gilson himself committed the abuse or simply permitted Coffman to commit the abuse.

Gilson's jury trial was held March 30-April 16, 1998, before Judge William Hetherington in Cleveland County District Court.[16] The jury returned guilty verdicts on all counts except the three counts of injury to a minor child. The jury acquitted Gilson of those charges but convicted him of first degree murder. The jury sentenced him to die. Gilson's appeal to the Oklahoma Court of Criminal Appeals detailed massive allegations of error.[17]

B. Gilson's Contentions on Appeal

Gilson's major argument to the appellate court was that the jury's verdict violated both the Oklahoma and U.S. Constitutions.[18] Gilson's core problem with the verdict revolved around the content of the verdict forms given to the jury. In addition to requiring the jury to choose between the standard options of "guilty" and "not guilty," the verdict forms also required the jury to specify the basis for a finding of guilt. The verdict forms read, "We make the following finding of fact as to the basis of our verdict of guilty: [ ]Unanimous as to child abuse [murder] [ ] Unanimous as to permitting child abuse [murder] [ ] Divided as to the underlying theory."[19] The jury returned a verdict of guilt but checked the box on the form designating that they were divided as to the underlying theory.[20] Gilson argued that the use of the altered jury forms allowed the jury to find him guilty of "something" without agreeing on what that something might be. Therefore, Gilson argued, the jury issued a non-unanimous verdict as to the actus reus of the crime.[21]

Additionally, Gilson contended that his conviction failed to establish his eligibility for the death penalty ("death-eligibility") under either the Oklahoma or U.S. Constitutions.[22] The altered verdict forms examined the mind of each juror. The prosecutors went beyond asking for a determination of guilt or nonguilt. The prosecutors asked the jurors to tell specifically which of Gilson's actions or inactions they found blameworthy. Thus, the prosecution's requested altered verdict forms

14. *Id.* ¶ 7, 8 P.3d at 896. Coffman herself testified at trial that Gilson disciplined the children only by spanking them with a wooden paddle. *Id.* ¶ 12, 8 P.3d at 897.

15. *Id.* ¶ 7, 8 P.3d at 896. The medical examiner could not definitively determine Shane's cause of death. Brief of Appellant at 12, *Gilson* (No. F-98-606). The medical examiner did testify at trial that none of the injuries to Shane were consistent with possible explanations of the injuries such as digging equipment, CPR, or normal childhood horseplay. *Id.*

16. Brief of Appellant at 1, *Gilson* (No. F-98-606).

17. *See supra* note 7.

18. Brief of Appellant at 15, *Gilson* (No. F-98-606).

19. *Gilson*, 2000 OK CR 14, ¶ 17, 8 P.3d at 898-99. The same instruction was given as to the felony child abuse charges on behalf of Shane and the other children. *See id.*

20. *Id.* ¶ 18, 8 P.3d at 899.

21. Brief of Appellant at 19, *Gilson* (No. F-98-606).

22. *Id.* at 24.

exposed the jury's reasoning to the court. The verdict forms demonstrate that the jurors did not agree on what Gilson was actually guilty of doing. Therefore, Gilson argued that the State did not prove that he killed, attempted to kill, intended to kill, or was a major participant in a felony showing reckless indifference to human life.[23] Further, Gilson argued that because the jury did not issue a definitive finding that Gilson committed the fatal abuse, the imposition of the death penalty was inappropriate and in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. Additionally, Gilson argued that the death penalty is clearly a disproportionate punishment to the crime of permitting child abuse murder.[24]

Because of the "divided as to the underlying theory" verdict, the prosecution did not establish whether Gilson *committed* or merely *permitted* the child abuse. Because a portion of the jury believed that he had only *permitted* the abuse, Gilson was, in effect, convicted under this statute and sentenced to die based on an omission to act. If Gilson's actus reus was merely permitting child abuse murder, he was the first defendant prosecuted under this statute with this actus reus to receive such harsh punishment.

After examining these allegations, the Oklahoma Court of Criminal Appeals affirmed the lower court's decision in the summer of 2000.[25] The court held that the altered jury forms were flawed but nonetheless resulted in only harmless error.[26] The court further held, as a matter of first impression, that a finding of death-eligibility could be based on merely *permitting* child abuse and that, in this case, the death penalty was an appropriate punishment for Gilson's crime.[27]

C. The Oklahoma Statute on Child Abuse Murder

Prior to 1982, the crime of child abuse murder did not statutorily exist as a separate and distinct crime in Oklahoma.[28] However, Oklahoma's first degree murder statute now contains a specific section covering cases of child abuse murder, which reads as follows:

> A person commits murder in the first degree when the death of a child results from the willful or malicious injuring, torturing, maiming or using of unreasonable force by said person or who shall willfully cause, procure or permit any of said acts to be done upon the child pursuant to Section 7115 of Title 10 of the Oklahoma Statutes. It is sufficient for the crime of murder in the first degree that the person either willfully tortured or

23. *Id.*

24. *Id.* at 33.

25. *Gilson*, 2000 OK CR 14, ¶ 180, 8 P.3d at 929.

26. *Id.* ¶ 44, 8 P.3d at 904. "Harmless error" is a term an appellate court uses when it believes the error was not of sufficient defect to change the result of the trial. Chapman v. California, 386 U.S. 18, 22 (1967).

27. *Gilson*, 2000 OK CR 14, ¶ 41, 8 P.3d at 922.

28. *Id.* ¶ 33, 8 P.3d at 902.

> used unreasonable force upon the child or maliciously injured or maimed the child.[29]

Based on the language in the statute, a person can violate the child abuse murder statute in two different ways: by committing child abuse — malfeasance — or by permitting child abuse — nonfeasance.[30] Notably, the crime of felony murder, also encompassed in a section of the first degree murder statute,[31] does not include child abuse in the list of specifically enumerated predicate felonies necessary for a felony murder conviction.[32]

III. The Law Prior to Gilson

A. U.S. Supreme Court Cases

In 1972, in the 5-4 opinion of *Furman v. Georgia*,[33] the U.S. Supreme Court held the death penalty, as it was then being administered, was unconstitutional under the Eighth Amendment's prohibition of cruel and unusual punishment. In 1976, the Court examined the constitutionality of the statutes that various states promulgated in response to *Furman* in *Gregg v. Georgia*[34] and four companion cases.[35] In *Gregg*, the Court upheld the Georgia statute allowing imposition of the death penalty for murder, with guilt to be determined in a bifurcated trial.[36] The Court stated that the death penalty serves the two societal purposes of retribution and deterrence.[37] The Court further opined that legislators must rely on capital punishment's two purposes when formulating legislation imposing the death penalty.[38]

One year later, in *Coker v. Georgia*,[39] the Court ruled that Georgia's death penalty statute violated the Eighth Amendment when imposed on a convicted rapist.[40] In *Coker*, the Court looked at objective evidence of societal acceptance of the death

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29. 21 OKLA. STAT. § 701.7(c) (Supp. 1999).

30. The statute convicts if the accused "cause[d], procure[d], or permit[ted]" any of the forbidden acts. *Id.*

31. *Id.* § 701.7(b).

32. Title 21, section 701.7(b) of the Oklahoma Statutes details felony-murder eligible felonies. These include murder or attempted murder of one other than the victim, discharge of a firearm or crossbow with the intent to kill or in a dwelling, forcible rape, robbery with a dangerous weapon, kidnaping, escape from lawful custody, first degree burglary, first degree arson, unlawful distribution or dispensing of a controlled dangerous substance, and trafficking in illegal drugs. *Id.*

33. 408 U.S. 238 (1972).

34. 428 U.S. 153 (1976).

35. *Id.* The companion cases to *Gregg* are *Jurek v. Texas*, 428 U.S. 262 (1976), *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Roberts v. Louisiana*, 428 U.S. 325 (1976), and *Proffitt v. Florida*, 428 U.S. 242 (1976).

36. *Gregg*, 428 U.S. at 162-63. The six categories of offenses in the statute were "murder, kidnaping for ransom or where the victim is harmed, armed robbery, rape, treason, and aircraft hijacking." *Id.* at 163.

37. *Id.* at 183.

38. *Id.* at 186.

39. 433 U.S. 584 (1977).

40. *Id.*

penalty for the crime of rape[41] and noted that Georgia was the only jurisdiction that allowed for the imposition of the death penalty in rape cases.[42] The Court reasoned that such strong state legislative rejection of the death penalty for rape confirmed the Court's own judgment "that death is indeed a disproportionate penalty for the crime of raping an adult woman."[43]

With the foundation of Eighth Amendment jurisprudence laid, the Court moved to the question of death-eligibility for felony murder convictions.[44] In *Enmund v. Florida*,[45] the defendant waited in the getaway car and then drove all of the codefendants away from the scene after an armed robbery, which resulted in the shooting death of two victims.[46] After being convicted for felony murder, the defendant was sentenced to death.[47] The Supreme Court reversed the conviction, holding that the Eighth Amendment forbids the imposition of the death penalty on one "who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."[48]

Subsequently, the Court modified *Enmund* in *Tison v. Arizona*.[49] The defendant in *Tison*, the son of a convicted murderer,[50] had assisted his father and his father's cell mate in a daring escape from prison. The son then watched while the two escapees shot a family of four.[51] The jury convicted him of felony murder and sentenced him to death; however, the Supreme Court handed down the *Enmund* decision and provided him a strong basis for appeal.[52] In deciding *Tison*, the Supreme Court articulated a two-prong test for death-eligibility in felony murder cases. To be death-eligible, the defendant must (1) be a major participant in the underlying felony, and (2) display reckless indifference to human life.[53] The Court then remanded the case for a determination of whether the defendant fit the second prong of the test.[54] The *Enmund/Tison* analysis now governs the issue of death-eligibility in all felony murder cases.

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41. *Id.* at 593.

42. *Id.* at 594.

43. *Id.* at 597.

44. Felony murder is the resulting crime when a person is killed during the commission or attempted commission of a felony. *See* BLACK'S LAW DICTIONARY 633 (7th ed. 1999).

45. 458 U.S. 782 (1982).

46. *Id.* at 784-85.

47. *Id.* at 782.

48. *Id.* at 797.

49. 481 U.S. 137 (1986). Decided together with this case was also the companion case of *Tison v. Arizona*, the appeal of the defendant's brother who was involved with the same crime, convicted, and sentenced similarly. *Id.* at 137.

50. *Id.* at 139.

51. *Id.* at 140-41.

52. *Id.* at 143-44.

53. *Id.* at 158.

54. *Id.*

B. Oklahoma Case Law

Prior to *Gilson*, the Oklahoma Court of Criminal Appeals had considered cases imposing the death penalty for violation of the child abuse murder statute. But the court had not determined the measure of culpability required to render a defendant eligible for the death penalty under the permitting portion of the statute.[55] The court considered the availability of the death sentence for child abuse murder by actually committing child abuse (as opposed to merely permitting child abuse), and sustained the imposition of death in both *Wisdom v. State*[56] and *Fairchild v. State*.[57]

In *Wisdom*, a three-year-old victim suffered severe head trauma that subsequently caused his death. The defendant in *Wisdom* was charged with first degree murder under the child abuse murder portion of the statute.[58] On appeal, the defendant challenged the constitutionality of the statute under the *Enmund/Tison* Eighth Amendment analysis set forth by the U.S. Supreme Court.[59] The Oklahoma Court of Criminal Appeals held that the *Enmund/Tison* analysis, dealing with felony murders, did not apply to Wisdom's case because Wisdom had actually killed with his own hands,[60] unlike the *Enmund* and *Tison* defendants who merely aided and abetted another person who caused the injuries that resulted in the victim's death.[61]

In *Fairchild*, the defendant was the live-in boyfriend of the victim's mother.[62] The couple had been drinking beer all day, and the three-year-old child began to cry during the night.[63] The defendant, after torturing the child in several ways, finally ended the crying by throwing the child against the edge of a table.[64] In *Fairchild*, the defendant clearly dealt the blow that caused the child's death because the child's mother was asleep in her bed at the time of the child's death.[65] Fairchild challenged the constitutionality of the statute.[66] The Oklahoma Court of Criminal Appeals reaffirmed its holding in *Wisdom* that the statute was constitutional and that the felony murder cases considered by the Supreme Court did not apply because Fairchild had himself killed the child.[67]

The court made another interesting observation in *Fairchild*. In a footnote, the court stated:

> The dissenting opinions equate First Degree Murder of a Child with "felony-murder." Despite similarities, however, there are significant

55. *See* Gilson v. State, 2000 OK CR 14, ¶ 128, 8 P.3d 883, 919.
56. 1996 OK CR 22, 918 P.2d 384.
57. 1999 OK CR 49, 998 P.2d 611.
58. *Wisdom*, 1996 OK CR 22, ¶ 1, 918 P.2d at 387.
59. *Id.* ¶ 37, 918 P.2d at 395.
60. *Id.* ¶ 40, 918 P.2d at 396.
61. *Id.*
62. *Fairchild*, 1999 OK CR 49, ¶ 3, 998 P.2d at 615.
63. *Id.* ¶¶ 4, 6, 998 P.2d at 615.
64. *Id.* ¶ 7, 998 P.2d at 616.
65. *Id.* ¶ 8, 998 P.2d at 616.
66. *Id.* ¶ 96, 998 P.2d at 630.
67. *Id.*

> differences. Unlike murders under the felony-murder rule, First Degree Murder of a Child requires proof of a willful or malicious action by the perpetrator or perpetrators resulting in the death of a child, either by use of unreasonable force upon the child or by any act which results in injury to the child. In First Degree Murder of a Child, the willful acts of the perpetrator cause the death. This requires an intentional act rather than an accidental or inadvertent act, but requires no specific intent to kill or injure.[68]

Apparently, the court forgot this distinction one year later when deciding the *Gilson* case.

IV. The Gilson Decision

A. The Majority Opinion

Without explanation and over defense counsel's objection, the Cleveland County District Court allowed the verdict forms that included the additional inquiry.[69] Gilson's appellate counsel argued that (1) committing and permitting child abuse are two distinct crimes; and (2) these alternative theories of guilt are repugnant to each other.[70] The State responded that permitting and committing child abuse are merely alternative means in which the single crime of child abuse murder can be committed.[71]

The Oklahoma Court of Criminal Appeals agreed with the State, relying on one of its previous holdings that the "[c]onstitutional requirement of a unanimous . . . verdict applies only to the ultimate issue of . . . guilt or innocence."[72] The court further reasoned that there was sufficient evidence to support a conviction on either theory.[73] Relying on *Schad v. Arizona*,[74] a Supreme Court case that gave constitutional sanction to the failure of the jury to reach agreement on preliminary factual issues underlying the verdict,[75] the court ultimately held that the disagreement went to the factual basis and manner of the commission.[76] Further likening the child abuse murder statute to felony murder, the court held that the child abuse murder statute should be interpreted in the same manner as the felony murder statute.[77] The court

68. *Id.* ¶ 100 n. 28, 998 P.2d at 631 n.28.
69. Gilson v. State, 2000 OK CR 14, ¶ 18, 8 P.3d 883, 899.
70. Brief of Appellant at 19-20, *Gilson* (No. F-98-606).
71. Brief of Appellee at 11, *Gilson* (No. F-98-606).
72. Rounds v. State, 1984 OK CR 49, ¶ 26, 679 P.2d 283, 287.
73. *Gilson*, 2000 OK CR 14, ¶ 35, 8 P.3d at 902-03.
74. 501 U.S. 624 (1991). *Schad* was a first degree murder case from Arizona where the defendant's jury was not required to choose between felony murder or premeditated murder. *Id.* at 629. The *Schad* Court held that there was no violation of due process. *Id.* at 645.
75. *Id.* at 630-31.
76. *Gilson*, 2000 OK CR 14, ¶ 37, 8 P.3d at 903.
77. *Id.* ¶ 41, 8 P.3d at 903.

found that the lower court erred by deviating from approved jury forms at Gilson's trial but found this error harmless.[78]

Because the jury was divided as to the underlying theory of guilt, the court reasoned that both theories of guilt must be sufficiently supported by the evidence in order to sustain the death penalty.[79] Confusingly, the court labeled the verdict a general verdict of guilt but then examined both the permitting and committing theories, as Gilson urged.[80] Under the committing theory, the court relied on *Wisdom* and *Fairchild,* both of which affirmed death sentences of defendants who actually committed the child abuse resulting in the child's death. Thus, if the jury convicted Gilson under the committing theory, Gilson was eligible for the death penalty.[81] Although Gilson urged the court to reconsider these holdings, it declined to do so.[82]

In addressing the question of whether a defendant convicted of first degree child abuse murder by permitting child abuse is eligible for the death penalty, the court compared the issue to deciding whether a non-triggerman felony murder defendant is eligible for the death penalty.[83] Thus, the court applied the *Enmund/Tison* analysis (applied by the Supreme Court in felony murder cases), analyzed each of the two prongs of the *Enmund/Tison* test, and ultimately held that death was an appropriate punishment for Gilson.[84]

Applying the test, the court reasoned that the evidence showed that Gilson was a "major participant" in the underlying felony based on the testimony of Coffman and her children that Gilson and Coffman had jointly harmed Shane, and that both had been in the bathroom with Shane for extended periods of time.[85] The court refused to accept Gilson's argument that his act was, at most, an omission.[86] The court further concluded that the record contained sufficient evidence of reckless indifference to human life. The same testimonial evidence, combined with additional testimony of Shane's swollen arms, a soft spot on Shane's head, Shane's irregular breathing after emerging from outdoors, further screams from Shane, and awareness of the struggle between Coffman and Shane convinced the court that Gilson had shown adequate indifference to human life to be eligible for the death penalty.[87]

Finally, the majority considered the defense's argument that the death penalty is disproportionate to the crime of child abuse murder by permitting child abuse. The court noted that the Supreme Court's line of Eighth Amendment death penalty cases clearly shows that the death penalty may only be imposed for two purposes — retribution and deterrence.[88] Unless the death penalty contributes to these goals, it "is

78. *Id.* ¶ 44, 8 P.3d at 904.
79. *Id.* ¶ 126, 8 P.3d at 919.
80. *Id.* ¶¶ 126-51, 8 P.3d at 919-24.
81. *Id.* ¶ 127, 8 P.3d at 919.
82. *Id.*
83. *Id.* ¶ 130, 8 P.3d at 920.
84. *Id.* ¶¶ 131-51, 8 P.3d at 920-24.
85. *Id.* ¶ 131, 8 P.3d at 920.
86. *Id.* ¶ 132, 8 P.3d at 920.
87. *Id.* ¶ 142, 8 P.3d at 922.
88. *Id.* ¶ 144, 8 P.3d at 923.

nothing more than the purposeless and needless imposition of pain and suffering."[89] Considering the goal of deterrence, the court reasoned that although "[c]hild abuse does not always result in death . . . death is the result often enough that the death penalty should be considered a justifiable deterrent to the felony itself."[90] Considering whether the retributive effect was appropriate, the court assessed Gilson's culpability as high[91] and cited Gilson's "personal participation in permitting Coffman to abuse the victim" as a basis for the determination that "the death penalty is not excessive retribution for his crime."[92]

B. The Concurrences and the Dissent[93]

Presiding Judge Struhbar issued a concurrence based solely on the doctrine of stare decisis.[94] Struhbar expressed the position that first degree child abuse murder should be a specific intent crime and that a finding of intentional harm must be made in cases of child abuse murder.[95] Judge Struhbar dissented in the *Fairchild* case, cited by the court throughout its opinion, based on the same reasoning.[96]

The dissent in *Gilson* was vigorous. Judge Chapel noted that the majority opinion devoted the first ten pages to detailing and repeating each and every terrible fact of the case.[97] Judge Chapel wrote, "Rather than analyze the legal issues the majority puts forth the horrible facts and then tries to mold the law to satisfy its decision to affirm the case."[98] The dissent did not agree that Gilson's participation should be analogized to non-triggerman felony murder and therefore did not agree with application of the *Enmund/Tison* analysis.[99] Judge Chapel argued that some culpability beyond knowing about and failing to stop a crime must exist; he also noted that the jury did not issue a unanimous verdict beyond a reasonable doubt as to Gilson's guilt.[100]

V. Analysis

A. The Altered Jury Forms Resulted in Reversible Error

Although the majority and concurring opinions recognized that the lower court erred by allowing deviation from the standard jury forms, they wrongly held this to be harmless error.[101] First, one must question why the prosecution needed to use these

89. *Id.* (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

90. *Id.* ¶ 148, 8 P.3d at 923.

91. *Id.* ¶ 150, 8 P.3d at 924.

92. *Id.*

93. Vice Presiding Judge Lumpkin wrote for the majority, joined by Judge Lile. Presiding Judge Strubhar concurred in the result and issued an opinion; Judge Johnson also concurred in the result. Judge Chapel dissented.

94. *Gilson*, 2000 OK CR 14, ¶ 1, 8 P.3d at 929 (Strubhar, J., concurring).

95. *Id.* ¶ 1, 8 P.3d at 930 (Strubhar, J., concurring).

96. *Id.*

97. *Id.* ¶ 1, 8 P.3d at 931 (Chapel, J., dissenting).

98. *Id.*

99. *Id.* ¶ 3, 8 P.3d at 931 (Chapel, J., dissenting).

100. *Id.*

101. Oklahoma mandates by statute that the authorized jury forms be used so long as they accurately

forms and why the trial judge allowed it. If the standard form was insufficient, there must have been a reason why the standard forms did not suffice. Other similarly situated defendants have been tried and convicted using the standard jury verdict forms. The majority opinion does not explain what reasoning the prosecution put forth to justify the use of the altered forms.[102] In the case of a general verdict of guilt or innocence, the jury would merely need to find that Gilson had either committed or permitted the abuse that caused Shane's death. Arguably, the altered verdict form actually allowed the prosecution to convict on lesser evidence because the forms did not require the jury to agree on what exact crime Gilson was guilty of committing. The jury found that Gilson was guilty of something — they simply could not agree what. When the jury could not agree, at the very minimum, the Bill of Particulars should have been stricken. The prosecution made a choice to use altered forms and should have done so at its own peril.

Deviation from the standard jury form should have a consequence. As an analogy, evidence obtained in violation of one's constitutional rights is excluded to deter unconstitutional law enforcement practices.[103] If law enforcement officials know that evidence may potentially be excluded, they will make increased efforts to follow the law in obtaining the evidence. Similarly, Oklahoma courts should try to deter deviation from the Oklahoma Uniform Jury Instructions and verdict forms. If the judiciary and prosecutors know that it may result in reversible error to deviate from the standard instructions and forms, they will be less likely to do so. This will reduce the likelihood of error inherent in formulating instructions to fit each specific situation. Oklahoma has expended the resources to develop these instructions for fairness and consistency. When a deviation occurs, it undermines the entire process and allows cases like *Gilson* to be riddled with error. If the standard jury verdict form had been used, the opinion in this case would not have expended such extensive judicial time and resource. Indeed, Gilson's jury would likely have been unable to reach a unanimous decision. The judge clearly should not allow the prosecution to submit altered forms, pick the brain of the juror, and then disclaim the results.

The prosecution's verdict form asked which theory the jurors believed beyond a reasonable doubt, and the jurors answered with an emphatic "neither." As Gilson argued, at least one of the jurors and up to eleven believed he committed the child abuse, or in the alternative, at least one and up to eleven believed he merely permitted the child abuse. This is clearly not unanimous. In fact, the prosecution needed the altered forms because it did not have an airtight case against Gilson. Their main witness, Shane's mother, had serious credibility problems because she plead guilty and became a witness for the State to avoid the death penalty herself. The prosecution obviously did not think the jury uniformly believed either the permitting or committing

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state the law. 12 OKLA. STAT. §§ 577.1, 577.2 (1991); *see also* Flores v. State, 1995 OK CR 9, ¶ 5, 896 P.2d 558, 560 (quoting Fontenot v. State, 1994 OK CR 42, ¶ 55, 881 P.2d 69, 84). Whether the instructions that should have been used in this case accurately state the law is a question beyond the scope of this note. However, as previously noted, the instructions were used to successfully convict other defendants.

102. *Gilson*, 2000 OK CR 14, ¶¶ 17-18, 8 P.3d at 898-99.

103. *See generally* Mapp v. Ohio, 367 U.S. 643 (1961).

scenario and needed to send the clear message, via the verdict forms, that the jury did not have to agree on the theory of guilt. For these reasons, utilization of the altered form and the subsequent non-unanimous verdict were not harmless error. Correction of this error would have likely produced a different outcome. Clearly, a new trial should have been granted on the basis of the altered jury forms alone.

B. The Court Incorrectly Equated Child Abuse Murder with Felony Murder

In Oklahoma, the felony murder statute does not contain the felony of child abuse among the enumerated predicate felonies. The State of Oklahoma's legislature created child abuse murder as a separate and distinct category apart from felony murder. Thus, the crimes are not the same. Premeditated first degree murder[104] does not call for the same analysis as felony murder; thus, the child abuse murder statute should not be analyzed in the same manner. The court itself specifically recognized this difference in the footnote in *Fairchild,* quoted above.[105] The court used this reasoning to arrive at its decision in *Fairchild,* but then abandoned the words one year later in *Gilson.*

Just as the dissent argues, the court wants to bend the law to decide *Gilson* as it sees fit. Applying rules from previous felony murder cases is inappropriate. When the legislature creates a separate category of murder, then the courts must abide by that separation and look at the case anew as if no precedent exists in the area. While it may be inviting to apply the reasoning from a well-established line of cases, doing so in this case resulted in inequity. As the dissent noted, the inequities exist because the evidence only supports the finding that Gilson knew Coffman was abusing Shane and did not stop her.[106]

Additionally, the Oklahoma Court of Criminal Appeals held in *Price v. State*[107] that a person commits murder in the first degree when the death of a child results from any type of child abuse, whether the abuse causing death would be classified as a felony or a misdemeanor.[108] Based on the holding in *Price,* the analogy drawn by the court between felony murder and child abuse murder was illogical. The court in *Price* found it unnecessary to determine whether a felony or a misdemeanor served as the underlying crime of the child abuse murder; therefore, the court has drawn a clear distinction between felony murder (which must have a felony as the underlying crime) and child abuse murder (which can have a felony or a misdemeanor as the underlying crime). Accordingly, the *Enmund/Tison* analysis should not have been applied in *Gilson.*

The court's holding in *Price,* combined with the court's holding in *Gilson,* gives cause for concern in Oklahoma. If a person permits child abuse that is of the nature of a misdemeanor and the child subsequently dies, the person failing to prevent the abuse would be held culpable for felony-grade child abuse. Thus, the "permitter"

104. 21 OKLA. STAT. § 701.7(a) (Supp. 1999).
105. Fairchild v. State, 1999 OK CR 49, ¶ 100 n. 28, 998 P.2d 611, 631 n.28.
106. *Gilson,* 2000 OK CR 14, ¶ 3, 8 P.3d at 931 (Chapel, J., dissenting).
107. Price v. State, 1989 OK CR 74, 782 P.2d 143.
108. *Id.* ¶ 24, 782 P.2d at 149.

could be subject to the death penalty under the *Gilson* court's analysis. Regardless of whether the child's death was foreseeable by either the "committer" or "permitter," either or both could be subject to the ultimate sanction for the action and inaction.

C. The Court Failed to Distinguish Between Malfeasance and Nonfeasance as Actus Reus

Action and inaction cannot coexist as the actus reus of a crime. *Black's Law Dictionary* describes malfeasance as "the commission of some act which is positively unlawful."[109] *Black's Law Dictionary* describes nonfeasance as the "[n]onperformance of some act which person is obligated or has responsibility to perform."[110] The two terms are in opposition. One cannot be guilty of both at the same time. Gilson argued that his was a case of omission only. The court rejected this contention, stating, "His active participation in the abuse occurring inside [the] . . . trailer is very different from a passive act of failing to provide what is required by law."[111] The very statement the court uses to justify its position demonstrates the absurdity of the proposition.[112] If Gilson actively participated in the abuse, then he did not merely permit the abuse.

As the dissent points out, the majority opinion relies on cases in which defendants assisted codefendants who actually pulled the trigger.[113] In contrast, no action is required for permitting child abuse murder.[114] Persuasively, Judge Chapel reasoned:

> There can be no *Enmund/Tison* analysis for a defendant who *permits* child abuse murder, because that person need neither intend that life be taken, contemplate lethal force would be used, have a substantial personal involvement in the crime, or exhibit reckless indifference to human life. *Enmund/Tison* focuses specifically on a defendant's personal culpability for murder.[115]

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109. BLACK'S LAW DICTIONARY 968 (7th ed. 1999).

110. *Id.* at 1076.

111. *Gilson*, 2000 OK CR 14, ¶ 132, 8 P.3d at 920.

112. In sustaining the conviction on either theory, the court relied on testimony by Coffman for both. The court found supporting evidence in Coffman's statement that she saw appellant coming out of the bathroom and then she found Shane in the bathroom not breathing. *Id.* ¶ 35, 8 P.3d at 902. In the very next paragraph of the opinion, the court relied on Coffman's admission that she was in the bathroom struggling with Shane when the shower doors fell down. *Id.* ¶ 36, 8 P.3d at 902. Appellant entered the bathroom not once, but twice, to attend to the shower doors. *Id.* The court stated that this second revelation by Coffman supports the permitting child abuse charge. *Id.* These two statements by Coffman are almost completely opposed to one another. The majority looked into the record and extracted segments to support its conclusions. Some of the jury obviously believed some parts of Coffman's testimony and others believed other parts, but the court used all of her conflicting testimony to justify upholding Gilson's death sentence. Some of the jurors who were there and observed Coffman did not believe her, but the court apparently did believe her and affirmed Gilson's conviction based on her erratic testimony. Either she was in the bathroom and Gilson came in to assist her with Shane, saw her wrestle with him, and had the opportunity to prevent his death, or she saw Gilson come out of the bathroom and Shane was not breathing. The court cannot have it both ways.

113. *Id.* ¶ 2, 8 P.3d at 931 (Chapel, J., dissenting).

114. *Id.* ¶ 3, 8 P.3d at 930-31 (Chapel, J., dissenting).

115. *Id.*

At common law, absent a special relationship, there was no duty to protect others from harm.[116] A moral duty to act was not enough.[117] The dissent does not believe that the legislature can make permitting child abuse a conviction that carries the death penalty: "A defendant must have some personal culpability, beyond knowing about and failing to stop another from committing a crime."[118] A defendant must perform an overt action, not the inaction of an omission. Nonfeasance operates differently than malfeasance, and it should not be treated equally under the law.

D. The Goal of Deterrence Is Not Served

The death penalty must serve deterrent and retributive purposes in society.[119] Someone who permits child abuse murder does not necessarily intend the harm; therefore, imposing the death penalty will not deter the crime of permitting child abuse murder. Logically speaking, the crime of an omission would not give a potential perpetrator notice that he or she must intervene or receive a possible death sentence. American jurisprudence typically has not imposed a legal duty to aid another person in peril, even when that aid can be provided without exposure to "danger or inconvenience" to the one providing aid.[120] As the *Enmund* Court reasoned, "Capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation."[121]

The majority's position — that death frequently results from child abuse and therefore the death penalty will deter future abusers — is without logical basis or merit. From 1987 through 1998, 359 children died in Oklahoma as a result of child abuse, neglect, or both.[122] On average, then, thirty children die from child abuse each year. In Oklahoma, in 1999, there were 16,217 confirmed child abuse and neglect cases.[123] Therefore, death results from child abuse and neglect 0.18%, less than 1%, of the time. The court's determination regarding the overwhelming need for deterrence is demonstrably factually inaccurate.

E. The Goal of Retribution Is Not Served

Retribution requires punishment for "just deserts."[124] If the defendant did not intend to kill, he is not sufficiently culpable for retributive goals to be achieved. One

116. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW, § 3.3 (West 1996).

117. Jean Peters-Baker, *Punishing the Passive Parent: Ending a Cycle of Violence*, 65 UMKC L. REV. 1003, 1009 (1997).

118. *Gilson*, 2000 OK CR 14, ¶ 4, 8 P.3d at 931 (Chapel, J., dissenting).

119. Coker v. Georgia, 433 U.S. 584 (1977).

120. Peters-Baker, *supra* note 117, at 1009. *See generally* People v. Beardsley, 113 N.W. 1128 (1907); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.06, at 79 (1987).

121. Enmund v. Florida, 458 U.S. 782, 799 (1982).

122. Barton Turner, Center on Child Abuse and Neglect, Department of Pediatrics, University of Oklahoma Health Science Center, Child Fatalities in Oklahoma, at 3 (unpublished report) (on file with author).

123. FY99 Annual Report, *at* http://www.okdhs.org/ifinance/Annual_Report/FY99/table_11.htm (last visited Nov. 12, 2001).

124. *Enmund*, 458 U.S. at 800-01.

who permits child abuse does not rise to the same level of culpability as one who abuses a child. One who delivers the blow cannot be said to be in the same shoes as one who stands by and does nothing. The death sentence in *Gilson* fails to meet either goal of such severe punishment and is a disproportionate punishment under the Eighth Amendment.

Oklahoma's death penalty statistics speak for themselves. From 1915 through the first seven months of 2001, Oklahoma has executed 127 people.[125] With the American Bar Association calling for a moratorium on the death penalty,[126] Oklahoma must ensure that everyone put on death row truly deserves to be there. Once imposed, the punishment of death cannot be taken back. Deterrence and retribution should clearly be served by any imposition of the death penalty. If courts are permitted to meld the definitions around a particular case's facts to show it serves the purposes, then the purposes will quickly lose meaning in Oklahoma courts.

F. The Impact of Gilson

Although the Oklahoma Court of Criminal Appeals contends *Gilson* involved more than a criminal omission,[127] it is unclear where the court will draw the line between omission and action in the future. For example, mothers who are themselves being abused to the point of irreparable fear and physical trauma may now be eligible to receive the death penalty in Oklahoma if their spouse or boyfriend also beats and subsequently kills their children. In Oklahoma, it appears that men and women must exercise extraordinary care before deciding to live with someone and their children. After *Gilson*, if the live-in kills the other's child by abuse, the other may be executed for failing to stop that abuse. Even though battered mothers can find themselves economically and socially trapped in abusive relationships, *Gilson* potentially exposes them to the death penalty for not finding a way out of the situation. If they do escape the abusive relationship and report the abuse, they themselves could be charged for the abusive acts that they allegedly permitted. Is there now a stringent duty to stop the abuse after one incident? It would seem that each incident of abuse allowed by a passive parent — who, in many situations, is also being abused himself or herself — will open up that passive parent to criminal prosecution and a possible death sentence if the child dies at the hands of the abuser.

In Oklahoma, statutes that require the reporting of child abuse also give rise to concern.[128] These reporting statutes make it a misdemeanor to fail to report child abuse. This is a form of liability for omission. Thus, reading *Gilson* together with *Price*, it is conceivable that one may be sentenced to die based on the misdemeanor

125. Okla. Dep't of Corrections, *Capital Punishment in Oklahoma, Death Row Information, available at* http://www.doc.state.ok.us/DOCS/CapitalP.htm (last visited Aug. 3, 2001). The first seven months of 2001 saw the execution of fourteen people in Oklahoma, a record pace in the modern era of capital punishment.

126. Press Release, Am. Bar Assoc., ABA President-Elect Calls for a Moratorium on Federal Death Penalty, Urges Lawyers to Review Death Penalty Systems in Their States (July 10, 2000), *available at* http://www.abanet.org/media/jul00/barnettdeath.html (last visited Nov. 12, 2000).

127. Gilson v. State, 2000 OK CR 14, ¶ 127, 8 P.3d 883, 919.

128. *See* 10 OKLA. STAT. § 7103(c) (2001).

of failing to report child abuse. Both failing to report child abuse and watching a child be abused to death are failures to act that could have possibly prevented the child's death. Oklahoma has now clearly extended the reach of the death penalty into the province of those who perform no overt act.

G. Cumulatively, Why Gilson Deserves a New Trial

Gilson's trial was unfair and saturated with errors. The altered jury forms deprived Gilson of his right to a unanimous jury verdict. The application of the felony murder doctrine to a principle not akin to felony murder allowed the State to rely on inapplicable U.S. Supreme Court cases to sanction its action. The Oklahoma Court of Criminal Appeals relied on conflicting testimony by Gilson's one-time codefendant, the child's mother. Additionally, the court failed to distinguish between nonfeasance and malfeasance. Equal punishment must not be imposed for each crime as if they required the same level of culpability. Finally, the death penalty's dual goals of retribution and deterrence will not be served by killing Gilson for this crime.

Gilson should be retried using Oklahoma's Uniform Jury Instructions and verdict forms. It is a clear and well-established principle that the State must prove its case beyond a reasonable doubt. The fact that permitting child abuse and committing child abuse are embodied within the same statute does not make them the same crime. They are, in fact, quite opposite crimes. If the State cannot prove either one beyond a reasonable doubt, then Gilson must be released. If the State's evidence at trial did not convince the jury what Gilson actually did, he should, at a minimum, be granted a new trial.

If, assuming Gilson was granted a new trial, all the State could prove was that Gilson permitted child abuse, then the death penalty is an inappropriate and disproportionate sentence. An omission — permitting child abuse — differs substantially from the overt act of killing. The level of culpability for imposing the death penalty must be greater than that of an omission.

VI. Other Jurisdictions

No other state has a first degree murder statute that specifically includes child abuse murder, as does Oklahoma. While most states currently have statutes imposing criminal liability for failure to prevent child abuse, the classification is normally a misdemeanor. Few states allow for a felony conviction for permitting child abuse, and no state allows the death penalty as punishment for permitting child abuse. In the states where it results in a felony charge, the death penalty is typically not available. Common state legislation in this arena falls under the guise of "failure to protect" laws.[129] Legislators seem to be trying to prevent the mistreatment of children by threatening to prosecute those who do not prevent child abuse from occurring.

Former California Governor Peter Wilson recently urged the California Legislature to pass a bill imposing a charge of second degree felony murder for fatal child abuse.[130] The Legislature, however, did not respond.[131] An Arkansas statute

129. Peters-Baker, *supra* note 117, at 1012.

130. *Id.* at 1004.

currently holds a legal guardian responsible for recklessly failing to take action to prevent abuse.[132] Mississippi presently holds parents and "any other person who lives in the household with a child" liable if they "knowingly condone" acts of felonious child abuse.[133] Other states, like Ohio, have broader statutes that allow leeway in establishing liability for those who abuse and those who allow abuse.[134] When a legal guardian creates "a substantial risk" of harm to a child by "violating a duty of care, protection or support," Ohio's child endangerment statute is violated.[135] Alabama law requires specific intent as an element of the offense.[136]

Florida has extended its failure to protect laws to a mother's boyfriend.[137] In *Leet v. State*,[138] the boyfriend knew the mother had been convicted of child abuse in the past but did not see the abuse occur.[139] The court held that the boyfriend's duty was the same because the child was in his home.[140] Some states have lower standards of culpability and less severe punishment for the non-abuser.[141]

Admittedly, child abuse is an awful crime, and as the *Gilson* majority points out, it is perpetrated upon society's most vulnerable and dependent citizens. Those who abuse children should be punished. Those who allow children to be abused should be punished. But the real decision that must be made is the differing extent to which each type of abuse should be punished. The more sound public policy decision is to impose less-severe punishment for the non-actor. Such a rule would deter permitting child abuse while allowing a reasonable punishment to be imposed for failure to do so. Imposing maximum penalties when no intentional killing has occurred and reckless indifference to human life has not been displayed does not serve a state well. Moreover, it violates the U.S. Constitution as interpreted by the Supreme Court.

VII. Conclusion

Gilson met Coffman in late 1994 when her children had been removed from her custody by DHS.[142] He helped her fix up her run-down trailer home so DHS would return her children.[143] Just a few short years later, Gilson was tried and convicted for "something" — maybe he abused the children or maybe she did and he let her. The fact remains that no one will ever be sure what the jury found that the evidence proved beyond a reasonable doubt in the Cleveland County Courthouse. No one will know what the jury thought of the culpability of the child's mother. Bertha Jean

131. *Id.*
132. ARK. CODE ANN. § 5-27-221(a)(1) (Michie 1997).
133. MISS. CODE ANN. § 97-5-40(1)-(2) (1999).
134. Peters-Baker, *supra* note 117, at 1013.
135. *Id.* at 1003, 1013 (quoting OHIO REV. CODE ANN. § 2919.22(A) (Anderson 1996)).
136. *Id.* at 1018.
137. *Id.*
138. Leet v. State, 595 So. 2d 959 (Fla. Dist. Ct. App. 1991).
139. Peters-Baker, *supra* note 117, at 1018.
140. *Id.*
141. *Id.*
142. Brief of Appellant at 3, Gilson v. State, 2000 OK CR 14, 8 P.3d 883 (No. F-98-606).
143. *Id.*

Coffman was lucky to get to the prosecutor first, but Gilson was not that lucky. And he will die as a result of a non-unanimous verdict, perhaps on the basis of an omission.

Finding a child's body stashed in an abandoned freezer is a telling reflection on society. With modern technology and privilege, one would hope we would have been able to prevent this type of senseless barbaric mistreatment. Likewise, one would hope a country as developed and prosperous as the United States would have stopped using the death penalty altogether. It has not. Imposing the death penalty based on an omission is also a chilling indictment of American society. It appears that Oklahoma's government requires even those who are not a child's parents to interfere or risk losing their life should the child die. The impact of this decision leaves everyone guessing as to his or her individual role in preventing child abuse. It remains to be seen how expansively the Oklahoma courts are willing to interpret this statute. Although other jurisdictions impose a lessor punishment and often rank permitting child abuse as a misdemeanor, in Oklahoma, if you permit child abuse and that abuse results in death, you are now eligible for the death penalty.

As of the summer of 2001, 119 people sat on death row in Oklahoma.[144] Donald Lee Gilson, Prisoner Number 264339, arrived on death row on May 28, 1998.[145] The roster lists his stay as indefinite.[146]

Carla Mullins

144. Okla. Dep't of Corrections, *Capital Punishment in Oklahoma, Death Penalty Information, available at* http://www.doc.state.ok.us/DOCS/CapitalP.htm (last visited Sept. 13, 2000).

145. *Id.*

146. *Id.* Petition for Certiorari in the United States Supreme Court was denied on April 2, 2001. Gilson v. Oklahoma, 121 S. Ct. 1496 (2001).